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No. 88-1409

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DAVID C. WALENTAS,

Petitioner,

v.

KENNETH LIPPER, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4 and JOHN DOE #5,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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I

THE SECOND CIRCUIT'S RECENT DECISION IN *NEU* v. *CORCORAN* REITERATES THAT CIRCUIT'S OVERLY RESTRICTIVE APPROACH TO THE CLEARLY ESTABLISHED LAW COMPONENT OF THE QUALIFIED IMMUNITY DEFENSE

Respondent Lipper, in his opposing brief, relies on *Neu* v. *Corcoran*, No. 88-7914, slip op. at 1727 (2d Cir., March 3, 1989), a case decided by the Second Circuit exactly one week after

Walentas filed his petition for a writ of certiorari in this Court. The *Neu* case dramatically illustrates the problems inherent in the Second Circuit's inflexible pro-defendant position on qualified immunity, and the importance of resolving the questions presented in Walentas' petition.

Once again in *Neu*, the Second Circuit applied an overly restrictive approach to the question of clearly established law, and found that the defendant state officials were entitled to qualified immunity because there was no prior case which clearly established that their conduct deprived the plaintiff of a liberty interest protected by the due process guarantees of the Fourteenth Amendment.

Neu alleged that two state insurance officials deprived him of a liberty interest by defaming him and imposing a stigma that foreclosed him from practicing his profession as an insurance salesman. The Second Circuit relied on its decision in *Walentas* v. *Lipper*, 862 F.2d 414 (2d Cir. 1988)[1] to bolster its conclusion in *Neu*, that because the alleged defamation did not occur in the course of dismissal from a *government job*, Neu's claim did not rise to the level of a constitutional violation. *Neu*, slip op. at 1740.

Respondent Lipper relies on *Neu* to support its argument that the Second Circuit does not require a prior case on all fours with the one under review to find that a clearly established constitutional right has been violated (Brief in Opp., pp. 13-14). In fact, the *Neu* court only gives lip service to that proposition when it states, "[t]he very action in question need not previously have been held unlawful, but the unlawfulness must be apparent in light of preexisting law." *Neu*, slip op. at 1731 (*citing*, *Anderson* v. *Creighton*, 483 U.S. 635 (1987).

Contrary to that proposition, the entire focus of the *Neu* decision is a painstaking analysis geared to making hair-line

[1] After Walentas' petition was filed in this Court, the Second Circuit's opinion was published and is now reported as *Walentas* v. *Lipper* at 862 F.2d 414 (2d Cir. 1988).

distinctions among the cases reliled on by Walentas and Neu to prove that the right to practice one's chosen profession without unreasonable government interference is clearly established by the decisions of this Court, and the other circuit courts, as well as the Second Circuit's own prior cases.

The combination of *Walentas* and *Neu* makes it virtually impossible in the Second Circuit for a private citizen who has been defamed by a government official and foreclosed from future business opportunities, to survive a motion for summary judgment on the ground of qualified immunity in a 42 U.S.C. §1983 action for damages premised on the deprivation of a constitutionally protected liberty interest.

It is well established that a liberty interest is implicated when the government dismisses an employee based on charges "that might seriously damage his standing and associations in his community," or that might impose "on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Board of Regents* v. *Roth*, 408 U.S. 564, 573 (1972). The charges against the employee must be made "public" by the government employer, *Bishop* v. *Wood*, 426 U.S. 341, 348 (1976), and the employee must allege that the charges are false, *Codd* v. *Velger*, 429 U.S. 624, 627 (1977).

In *Walentas*, the Second Circuit acknowledged that at least three cases had applied those principles with equal force in situations involving the *possibility* of employment. *Walentas* v. *Lipper*, 862 F.2d 414, 422, n.3 (2d Cir. 1988) (*citing*, *Bartel* v. *FAA*, 725 F.2d 1403 (D.C. Cir. 1984); *Larry* v. *Lawler*, 605 F.2d 954 (7th Cir. 1978); and *Doe* v. *United States Civil Serv. Comm'n*, 483 F.Supp. 539 (S.D.N.Y. 1980)). Nevertheless, the Second Circuit refused to recognize that *Bartel*, *Larry* and *Doe* had clearly established that the deprivation of a liberty interest may occur where there had been a stigmatizing denial or foreclosure from employment opportunities in a pre-employment context.

Contrary to the Second Circuit's interpretation in *Walentas* and *Neu*, this Court has never held that dismissal or

termination from a government job is a pre-requisite to finding a constitutional deprivation of liberty. This Court's decisions in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), and *Paul* v. *Davis*, 424 U.S. 693 (1976) established what is commonly known as the "stigma plus" or "reputation plus" test. Although the parameters of an injury to reputation are clear, the contours of the "plus" remain ambiguous. The Second Circuit admitted as much in *Neu* when it observed in dicta,

> "On the one hand, *Paul* suggested that reputation, together with 'some more tangible interests such as employment,' could constitute a liberty interest. 424 U.S. at 701. It did not say that 'employment' had to be *government* employment. Thus, *Paul* might plausibly be interpreted as holding that any governmental defamation that causes a person to lose his job and impairs his ability to pursue his chosen profession or occupation is enough to constitute a deprivation of liberty, even if it does not occur in the course of dismissal from government employment or alteration of some other right or status recognized by state law. The 'plus,' in other words, might simply be that a consequence of the defamation was deprivation of the right, recognized in *Meyer* v. *Nebraska* [262 U.S. 390, 399 (1923)], 'to engage in any of the common occupations of life.'" (Emphasis in the original.) *Neu*, slip op. at 1736.

In *Neu*, the Second Circuit held that because Neu had been prosecuted for selling insurance without a license, he had no legally protected status entitling him to pursue his occupation in disregard of state law. *Neu*, slip op. at 1742, n.3. No such charges of wrongdoing have been made against Walentas, and the termination of his status as the developer of the Fulton Landing project was sufficient to constitute a deprivation of a liberty interest.

In short, Respondent Lipper's brief in opposition ignores the most significant issue raised in Walentas' petition concerning the existence of a conflict between the Second Circuit's rigid

analysis of clearly established law and the more flexible approach adopted by most other circuit courts. Nor does Lipper offer any policy reasons in support of the Second Circuit's overly restrictive treatment in *Walentas* and *Neu* of this Court's qualified immunity decisions.

II

RESPONDENT'S BRIEF IN OPPOSITION OFFERS NO PERSUASIVE REASON FOR DENYING CERTIORARI

Respondent Lipper does not offer any cogent reason why this case does not present an ideal opportunity for this Court to address the immunity questions raised in Walentas' petition, nor does Lipper deny the importance of those issues. Instead, Lipper attempts to argue the case on the merits, by raising trivial factual questions which are not relevant for the purpose of determining the issue of immunity.

It is important to emphasize that the Second Circuit was reviewing a grant of summary judgment, and if there were genuine issues of material facts before the district court, then the grant of summary judgment was improper. Nevertheless, given the procedural posture in which the appeal came to the Second Circuit, the court assumed the truth of the plaintiff's allegations, *Walentas* v. *Lipper*, 862 F.2d at 415 (*citing*, *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962); *Hawkins* v. *Steingut*, 829 F.2d 317, 319 (2d Cir. 1987); *Luce* v. *Edelstein*, 802 F.2d 49, 52 (2d Cir. 1986)), and accepted Walentas' account of the facts.

Thus, the issue before the Second Circuit was limited to whether based on the plaintiff's allegations, Walentas had a clearly established constitutional right which precluded a finding of qualified immunity. Because of the Second Circuit's restrictive analysis of the liberty interest cases, and the court's rigid insistence on a precise factual correspondence between the conduct at issue and reported case law, Lipper was granted immunity and Walentas was denied his day in court.

Despite this procedural posture, the brief in opposition attempts to shift the focus from Lipper's wrongful conduct by introducing irrelevant facts and specious arguments. For instance, the fact that Walentas was not a government employee is a distinction with no real difference. In New York, the real estate development business involves a close partnership among government agencies, financial institutions and private developers. Walentas' designation as the developer of a $160 million project sponsored by two State agencies and one City agency on a fifteen-acre parcel of government-owned property, should at the very least be considered "quasi-governmental." That was the case in *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980), where the director of a not-for-profit corporation responsible for urban redevelopment in Syracuse successfully asserted a liberty interest claim when he alleged that city officials had mounted a campaign to have him fired.

Respondent Lipper also argues that Walentas "had no federally protected liberty interest in his company's status as conditionally designated developer of the Fulton Landing project." (Brief in Opp., p. 13). This statement ignores the fact that customarily the final designation of the developer of a government project is a ministerial act to be performed by the City and State agencies that selected the conditional designee. Otherwise, no conditional designee would ever incur the enormous costs necessary to prepare the final plans for a project of this size. In this case, even if the City had wanted to terminate the contract, Walentas had no reason to assume the termination was effective without the concurrence of the two State agencies also responsible for the project. Thus it is clear that, but for Lipper's intervention, the final designation would have been awarded to Walentas.

Respondent Lipper's brief in opposition does not deny that Walentas was stigmatized by the publication of false statements in conjunction with his removal as the developer of Fulton Landing. Rather, Lipper questions whether Walentas can substantiate his claim that he has been foreclosed from a range of career opportunities (Brief in Opp., pp. 2-3, 11-13). For instance, while

it may be true that negotiations over Fulton Landing continued after Lipper resigned as Deputy Mayor, the fact is that Walentas was never reinstated as the developer, and the redevelopment plans for the Brooklyn waterfront remain dormant to this day.

Respondent Lipper also questions whether Walentas was deprived of any private real estate development opportunities, including the Museum of American Folk Art project. However, these factual issues as to whether, and to what degree Walentas was harmed cannot be resolved on a motion for summary judgment. Walentas should be permitted to depose witnesses and otherwise conduct discovery on the issue of damages and his foreclosure from these government and non-government projects. The grant of summary judgment precluded that opportunity for discovery.

Finally, Respondent Lipper grossly distorts Walentas' argument concerning the standard for qualified immunity by claiming that contrary to the holding of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), Walentas relies on Lipper's malicious motives to reintroduce the subjective element of the immunity defense. (Brief in Opp., p. 8). Stated more accurately, it is Walentas' position that *viewed objectively*, Lipper's conduct cannot reasonably be characterized as being in good faith.

Although the *Harlow* Court rejected any inquiry into malicious intent, it by no means eliminated the requirement that a government official's actions be reasonable and undertaken in good faith. In fact, the term "qualified immunity" is often used interchangeably with "good faith immunity" throughout the Court's opinion.[2]

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[2] For instance, *Harlow* states that "[q]ualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." 457 U.S. at 815 (*citing*, *Gomez* v. *Toledo*, 446 U.S. 635 (1980)), and that the Court's decision only applied to civil damage suits arising from "actions within the scope of an official's duties and in 'objective' good faith." 457 U.S. 819, n. 34.

The Second Circuit applied "good faith immunity" in such a way as to make Lipper's "good faith" irrelevant. Thus, the circuit court ignored the dictates of this Court in *Harlow* and its progeny, which make immunity available only to those public officials whose conduct conforms to a standard of objective legal reasonableness.

CONCLUSION

For the reasons set forth above, this petition for certiorari should be granted.

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March 31, 1989

Respectfully submitted,

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